IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 28, 2007 Session

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION v. DAN WILSON D/B/A MID-TENN FENCING

Appeal from the Chancery Court for Rutherford County
No. 03-7675CV Robert E. Corlew, III, Chancellor

No. M2006-00930-COA-R3-CV - Filed on July 30, 2007

BellSouth sued Mr. Wilson to collect nearly $24,000 he allegedly owed for business advertising placed in two editions of The Real Yellow Pages. At trial, BellSouth was unable to produce one of the contracts for the advertisements in question, nor could it present comprehensive documentation of the debits and credits to Mr. Wilson's accounts with BellSouth, from their inception to present. Mr. Wilson testified that he had received free advertising from BellSouth due to errors in previous advertisements and that he did not owe BellSouth any money. In support of this assertion, Mr. Wilson offered the testimony of his bookkeeper, Mary Villa Green. Ms. Green testified that, according to her calculations, BellSouth owed Mr. Wilson $8,500, and Mr. Wilson owed BellSouth nothing. Both parties introduced correspondence and statements from BellSouth. However, some of the documents were inconsistent, and the evidence was obviously not a complete and accurate summary of the business relationship between the parties. The trial court entered a judgment of $10,000 in favor of BellSouth, and Mr. Wilson appeals. After careful review, we hold that the trial court erred in ordering Mr. Wilson to pay BellSouth $10,000. We reverse and remand for entry of a judgment in favor of Mr. Wilson.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

William Kennerly Burger, Murfreesboro, Tennessee, for the Appellant, Dan Wilson d/b/a Mid-Tenn Fencing.

Mark B. Reagan and Phillip D. Patterson, Nashville, Tennessee, for the Appellee, BellSouth Advertising & Publishing Corporation.

OPINION

I. Background

For more than 20 years, Dan Wilson d/b/a Mid-Tenn Fencing ("Mr. Wilson") has operated a fencing business in Middle Tennessee. He advertised his business for a period of time in The Real Yellow Pages (the "Yellow Pages"), a telephone directory compiled by BellSouth. At some point, a dispute arose regarding the amount owed by Mr. Wilson to BellSouth. On November 21, 2003, BellSouth Advertising & Publishing Corporation ("BellSouth") sued to collect $23,962.11 allegedly owed by Mr. Wilson for advertising he had placed in the 1999 issues of the Nashville and Murfreesboro Yellow Pages. BellSouth also sought late fees, interest, attorney's fees, and the costs of collection. In his answer, Mr. Wilson asserted the affirmative defense of accord and satisfaction, claiming that BellSouth agreed to give Mr. Wilson the disputed Yellow Pages ads for free as compensation for omitting his ad(s) the previous year. Mr. Wilson also filed a counter-complaint for lost income and damage to his business reputation in the amount of $60,000.[1]

BellSouth presented the deposition and live testimony of Leo Moceri, a credit and collections manager for BellSouth's Middle Tennessee office. Mr. Moceri stated that he has been employed by BellSouth in that position since 2000 and for 16 years before that as a sales representative; however, he only became involved with this dispute two weeks before his deposition was taken. Mr. Moceri presented certain financial records of BellSouth and attempted to discount the testimony of Mr. Wilson's bookkeeper, Mary Villa Green. At no point in Mr. Moceri's testimony did he state the exact amount that was owed by Mr. Wilson to BellSouth. He was also unable to produce a comprehensive accounting of Mr. Wilson's business with BellSouth Advertising & Publishing Corporation, starting with a zero balance and showing all of the charges and payments on Mr. Wilson's accounts. Furthermore, BellSouth was unable to produce all of the contracts for advertising services which Mr. Wilson allegedly ordered, including the 1999 Murfreesboro advertising contract, which is at the heart of this lawsuit.

In response to BellSouth's proof, Mr. Wilson testified that his Yellow Pages ads are an important part of his business, and the ads change each year depending on his needs. Mr. Wilson also stated that the first year he advertised with BellSouth, the ad contained several typographic errors. He stated that to make up for the mistakes in the first year's ad, a BellSouth representative gave him "a lot of free ads," although Mr. Wilson did not offer any paperwork at trial to support his assertion. Mr. Wilson said that he has had at least three different bookkeepers research the debt that BellSouth claims it is owed by him, and that all have concluded that BellSouth owes Mr. Wilson money, not the other way around.

Mary Villa Green, one of the bookkeepers hired by Mr. Wilson, testified that BellSouth is indebted to Mr. Wilson in the amount of $8,500.59. Ms. Green reached this conclusion after approximately 40 hours of research, which included examining "[a] box with BellSouth's statements

[1]The trial court dismissed Mr. Wilson's counter-complaint, and it is not at issue in this appeal.

in them, and Mr. Wilson's canceled checks." However, rather than introducing all of these items as exhibits at trial, counsel for Mr. Wilson instead admitted only a spreadsheet created by Ms. Green purporting to show erroneous calculations and improper transactions by BellSouth, including allegedly double-billing Mr. Wilson for advertising and failing to credit Mr. Wilson's account for a credit that BellSouth told him he would receive. Ms. Green testified that Mr. Wilson maintained "probably around seven" account numbers with BellSouth, further adding to the difficulty in deciphering payments and charges related to Mr. Wilson's business relationship with BellSouth.

Following a bench trial on December 22, 2005, the trial court took the case under advisement for nearly three months, after which it entered a judgment against Mr. Wilson in the amount of $10,000. The trial court denied BellSouth's request for attorney's fees and prejudgment interest. Mr. Wilson appeals.

II. Issue Presented

The issue presented is whether the trial court erred in awarding BellSouth a judgment against Mr. Wilson in the amount of $10,000.

III. Analysis

In a non-jury case such as this one, we review the record *de novo* with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless there is evidence which preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings. *Seals v. England/Corsair Upholstery Mfg. Co.,* 984 S.W.2d 912, 915 (Tenn. 1999). The trial court's conclusions of law are accorded no presumption of correctness. *Campbell v. Florida Steel Corp.,* 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

In order to convey the difficulty the trial court faced in reconciling the evidence presented by the parties, we quote liberally from its opinion:

> *It was clear to the Court that the evidence is not before us from which we can make any type of precise accounting*. Leo Moceri, a collections manager and credit manager for Bellsouth [sic] testified. With all due respect to Mr. Moceri, he was placed in the position [of] having to rely on records which were inconsistent, incomplete, and even contradictory. Similarly, the Defendant, Mr. Wilson, kept records which were incomplete and unreliable. To his credit, Mr. Wilson hired a bookkeeper whose credentials were challenged by the Plaintiff, but who did the best she could to reconstruct the transactions, but she acknowledged, both in answer to questions

> posed by the Court and in cross-examination either that she was unclear with respect to portions of the transactions or that, given facts which otherwise surfaced during the proceeding, she misallocated transactions.
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> * * *
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> After considering all of the testimony and evidence presented, we have reached the conclusion that the Defendant is indebted to the Plaintiff, but we fully acknowledge that the evidence does not demonstrate that the Plaintiff is entitled to the $23,962.11 it seeks, and as stated above, *it is not possible to precisely determine the amount owed*.
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> * * *
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> In addition to all of the factors discussed above, the fact that some of the older records were either lost, destroyed, or in archives where they had not been located, and simply the fact that the bills maintained by the Defendant were bills for multiple services from various providers added additional confusion to the evidence. While we understand the merit in billing for local, long distance and yellow page service in a single bill, and we recognize that that may be done as an accommodation to the customer, it certainly causes confusion when it is alleged the bills are not paid, or not paid in full, and with incomplete records we are asked to unravel the transactions. The fact that the accountants, whose job it is to unravel accounts, have a disparity in their calculations of nearly $50,000 (Bellsouth [sic] calculated the Defendant owes in excess of $41,000, while Mid-Tenn and Mr. Wilson calculate Bellsouth [sic] owes Mr. Wilson over $8,500) speaks volumes concerning the difficulties in attempting to accurately consider the proof.
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> *For all of the reasons stated above, it is impossible to precisely calculate the amount of the debt the Defendant owes to the Plaintiff, despite the precise assertions of each of the parties*. As we stated above, we believe the Defendant is indebted to the Plaintiff. After considering all of the evidence at some considerable length, we find that the Plaintiff should be entitled to recover the sum of $10,000. Because of the confusion of the issues, we do not find that attorney's fees or prejudgment interest should properly be awarded. The Defendant must, however, bear responsibility for the payment of the costs.

(emphasis added). The trial court repeatedly stated that it was impossible to determine how much money Mr. Wilson owed to BellSouth. However, because the trial court believed that Mr. Wilson was indebted to BellSouth in some amount, it rendered a judgment for $10,000 in favor of

BellSouth. The trial court erred by doing so.

After spending a significant amount of time poring over the evidence in this case, we, too, are uncertain of how much Mr. Wilson owed, if indeed he owed anything at all, to BellSouth. We have found statements, letters, and other references to at least five different accounts held by Mr. Wilson. However, there is not a continuous stream of billing information for any of them. BellSouth failed to present proof of how or why the charges accrued on these bills, nor did it show a comprehensive list of the payments credited to Mr. Wilson's account. The lack of complete accounting information regarding Mr. Wilson's business activities with BellSouth was acknowledged by BellSouth's own witness, Mr. Moceri:

> Q: [W]hen would be the last time that your records reflect that there was a zero balance, where your records as far as Dan Wilson and Mid-Tenn Fencing were concerned would reflect that he just didn't owe you anything at all or owe your company anything at all?
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> A: I wouldn't have knowledge of that based on this information. Mr. – Dan was in advertising for a long time; I wouldn't be able to go back that far.
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> * * *
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> Q: What record would we need to look at within your files there that you don't have with you here today that would show when there was a zero balance? It is just a predating of this –
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> A: Well, we wouldn't show –
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> Q: – history that you have?
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> A: We wouldn't show a zero balance but if we pulled the bill statement from 10/21/2000 and we pulled what was billed for that month, which would show the cycle beginning in Murfreesboro – because it starts in September through the following August – you would show a zero billed amount, which would make this a static balance (indicating) plus interest. . . . But as far as the account itself having a zero, there wouldn't be a time where it was zeroed out.
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> Q: Well, at some point – there would have been some originating point where he didn't owe you anything; wouldn't there be?
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> A: Post – or pre '96, I guess it would be.

As an illustration of the accounting nightmare that the trial court was asked to decipher, the following documents were among the evidence presented at trial:

> 1. Two bills to Mr. Wilson for the same BellSouth account number, both issued on Jan. 5, 1999, one showing a balance of $3,392.27, and the other claiming a balance due of $5,500.44.
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> 2. A bill dated May 22, 1999, showing a credit of $15,026.68, which resulted in a zero balance due, plus another credit of $11,193.93. However, there was no evidence presented by BellSouth as to whether Mr. Wilson actually received the $11,193.93 credit, as the balance on that account was already at zero when the credit was issued.
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> 3. A summary of monthly statements for an account opened in March 2000 with a balance of $11,762.07. BellSouth failed to explain why the new account had an opening balance or, if the balance was transferred from an older account to the new account, whether the old account was closed with a zero balance so that Mr. Wilson was not charged twice.

Our courts have repeatedly held that in an action to collect a debt, the plaintiff bears the burden of proving the existence of that debt. ***Marsh & McClennan, Inc. v. T.J. & L. Constr. Co.***, No. 02A01-9110-CH-00234, 1992 WL 67896 (Tenn. Ct. App., filed April 7, 1992); *accord* ***Northwestern Mutual Life Ins. Co. v. Newsom***, 2 Tenn. App. 70, 1925 WL 1933, at *2 (Tenn. Ct. App. 1925). As such, it was BellSouth's duty to introduce proof which established, by a preponderance of the evidence, that Mr. Wilson was indebted to BellSouth in the amount of $23,962.11. We agree with the trial court's assessment that there is no way to accurately determine the amount owed by Mr. Wilson, if any, from the evidence presented at trial. We find this case analogous to ***C & W Asset Acquisition, LLC v. Oggs***, in which the plaintiff sued for recovery on advances allegedly made to the defendant under a loan agreement. No. E2006-01251-COA-R3-CV, 2007 WL 247700 (Tenn. Ct. App. E.S., filed Jan. 30, 2007), *appl. perm. appeal denied May 14, 2007*. There, we affirmed the trial court's judgment in favor of the defendant, finding that the plaintiff had failed to carry its burden of proof in proving that the defendant owed the debt. In doing so, we stated as follows:

> Mr. Oggs did not deny that he had in the past transacted business pursuant to the loan agreement, but only that he did not owe the debt currently asserted by C & W. We do not agree that the trial court erred in finding that C & W failed to carry its burden of proof by introducing witness testimony which was based upon a deficient and incomplete record and pertained to transactions of which its witness had no personal knowledge.

Id. at *3. The situation presented in ***Oggs*** is remarkably similar to the facts presented in the case at bar. Here, we are dealing with a creditor, BellSouth, with whom Mr. Wilson had conducted business

several times in the past. BellSouth's witness was unfamiliar with the details of Mr. Wilson's accounts, having only started working on the case two weeks before he was deposed. Furthermore, the records presented by BellSouth in support of its claim were incomplete, contradictory, and confusing. BellSouth was unable to produce all of the contracts related to the advertising in question, nor could it present a record of Mr. Wilson's accounts that began with a zero balance and reflected all of the charges and credits since then. Therefore, we must conclude, as we did in ***Oggs***, that BellSouth failed to meets its burden of proof in establishing a debt owed by Mr. Wilson. Accordingly, we hold that the trial court erred by granting a judgment in favor of BellSouth. As the plaintiff in this action, BellSouth bore the burden of proving the amount of Mr. Wilson's debt, and it clearly failed to do so.

At oral argument, counsel for BellSouth argued that if the Court did not agree that the preponderance of the evidence supported the trial court's $10,000 judgment against Mr. Wilson, then it could instead fashion an award based on multiplying the monthly fee for each of Mr. Wilson's Yellow Page ads in 1999 times 12 months, the length of the contract. This we will not do for several reasons. First of all, BellSouth failed to produce one of the two 1999 contracts which are the basis for its claims against Mr. Wilson, so it has failed to establish that Mr. Wilson even agreed to place that advertisement. Secondly, we are not convinced that Mr. Wilson did not make any payments on his accounts during the time period in question. Finally, there was documentation presented at trial regarding a credit of more than $11,000 that may not have been applied to any of Mr. Wilson's accounts with BellSouth. Mr. Wilson's bookkeeper, Ms. Green, pointed out several discrepancies in BellSouth's records, including payments made and credits that were not credited to Mr. Wilson's account. BellSouth's incomplete and, at times, contradictory records support Ms. Green's testimony that there are errors in the way BellSouth calculated the balance due on Mr. Wilson's account. Therefore, we are not willing to reduce this case to the simple computation advocated by BellSouth.

IV. Conclusion

After careful review, we hold that the trial court erred in entering a judgment in favor of BellSouth. We reverse and remand for entry of a judgment in favor of the defendant, Mr. Wilson, and for further proceedings consistent with this opinion. All costs of appeal are taxed against the Appellee, BellSouth Advertising & Publishing Corporation.

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SHARON G. LEE, JUDGE